LEGISLATION

Cigarette Tax

P.L. 2001, C. 396 — Application of Cigarette Tax Stamp
(Signed into law on January 8, 2002) Amends the Cigarette Tax Act to revise the prohibition against affixing tax stamps to packages that do not comply with the law.

Under the legislation, distributors cannot stamp packages that:

- Do not comply with Federal cigarette labeling law, including warning label requirements and Federal trademark and copyright laws.
- Have been altered by placement of a sticker over certain required Federal labels.
- Contain cigarettes not in compliance with the cigarette ingredients disclosure requirement of the Federal Cigarette Labeling and Advertising Act.
- Were imported into the United States in violation of the Federal Imported Cigarette Compliance Act of 2000.

The law also eliminates the discretion of the Director of the Division of Taxation to resell, rather than destroy, any cigarettes confiscated as a result of having been stamped in violation of the statutory prohibition. This act took effect immediately.

P.L. 2002, C. 33 — Rate Increases
(Signed into law on July 1, 2002) Increases the cigarette tax from $0.04 to $0.075 per cigarette (from $0.80 to $1.50 per pack of 20) effective July 1, 2002.

Corporation Business Tax

P.L. 2001, C. 193 — Corporate Mergers
(Signed into law on July 31, 2001) Permits a corporation organized in New Jersey to change from an operating corporation to a holding corporation with one or more wholly owned subsidiaries by use of a merger without shareholder approval or a transfer of assets. The bill allows a corporation (parent) to form a direct subsidiary and an indirect subsidiary (a subsidiary owned by the direct subsidiary), and to merge the resulting parent corporation into the direct subsidiary. The direct subsidiary would then become the new parent corporation, and the original parent corporation would become a subsidiary. This merger method does not require shareholder approval if the new parent corporation is structurally identical to, with the same shareholder rights and directors as, the old parent corporation.

Also, the act provides that the Secretary of State, upon filing of the certificate of merger, forward a copy of the certificate to the Director of the Division of Taxation. Chapter 193 took effect immediately.

P.L. 2001, C. 321 — Tax Credit for Wastewater Treatment Equipment
(Signed into law on January 4, 2002) Provides a Corporation Business Tax credit for taxpayers purchasing certain wastewater treatment and conveyance equipment, within a privilege period, used in the treatment and transport of effluent for reuse in an industrial process exclusively within New Jersey.

The amount of the credit is equal to 50% of the cost of the treatment or conveyance equipment less any loan amount received under N.J.S.A.13:1E-96 (State Recycling Fund) and excluding any sales and use tax. The amount of credit claimed for the privilege period in which the purchase is made and in each period thereafter may not exceed 20% of the total allowable credit. Additionally, the credit, when combined with other allowable credits, may not exceed 50% of the tax liability that would otherwise be due; nor may it reduce the tax liability to less than the statutory minimum. The credit can be passed through a partnership to the partners and an unused credit can be carried forward.

To qualify for the credit the taxpayer must submit a copy of a determination from the Department of Environmental Protection that the operation of the equipment and reuse of wastewater effluent will be beneficial to the environment, and an affidavit affirming that the equipment will be used only in New Jersey when filing the tax return.

This act took effect immediately and applies to purchases made in privilege periods beginning on or after July 1, 2002.

P.L. 2001, C. 399 — Manufacturing Equipment and Employment Investment Tax Credit
(Signed into law on January 8, 2002) Provides this tax credit under the Corporation Business Tax for certain

electric and thermal energy production. The act is retroactive to January 1, 2002, and applies to tax years beginning on and after that date.

P.L. 2002, C. 40 — Business Tax Reform Act
(Signed into law on July 2, 2002) Reforms the Corporation Business Tax Act and other relevant sections of law to ensure that corporations and other business entities bear a fair share of the tax burden. The legislation closes numerous loopholes that had allowed profitable companies to reduce their taxable New Jersey income by shifting income to affiliated corporations outside the State and developing expenses to reduce income within the State.

Chapter 40 creates an Alternative Minimum Assessment (AMA) (i.e., tax on either gross profits or gross receipts, at the taxpayer's election) designed to ensure that companies are taxed on the true level of economic activity in New Jersey in situations where the traditional "taxable income" measure is not an accurate gauge of such activity.

The statute also provides several new tax advantages to small businesses, eliminates the Savings Institution and Corporation Income Taxes, and incorporates the features of these taxes into the Corporation Business Tax. It also facilitates tracking of the income of entities such as partnerships, which do not pay taxes but, instead, distribute income to their members, the eventual taxpayers.

Other provisions of Chapter 40 decrease tax benefits for investment companies; suspend the use of certain net operating losses for two years; disallow the deduction of interest payments made to related parties; and accelerate fourth quarter estimated payments for large taxpayers. More complex changes regarding calculations have been introduced to decrease the impact of the reform act on groups of related corporations. These include a cap on the amount of receipts "thrown back" to New Jersey and a cap on the total Alternative Minimum Assessment.

This act took effect immediately and applies to privilege periods and taxable years beginning on or after January 1, 2002, provided however, that section 26 shall apply to privilege periods ending after June 30, 1984.

Estate Tax

P.L. 2002, C. 31 — Tax Computation Changed
(Signed into law on July 1, 2002) Provides that the New Jersey Estate Tax is to be computed either according to the terms of the Federal Estate Tax in effect on December 31, 2001, or, at the election of the person responsible for filing the estate tax return, by using a simplified system to be developed by the Director of the Division of Taxation. This preserves the New Jersey Estate Tax as the Federal credit on which it is based is phased out. The law makes the property of New Jersey estates subject to State tax liens. It also repeals sections of the existing law which provided for (1) the voiding of New Jersey's Estate Tax in the event of the repeal of the Federal Estate Tax or the Federal credit for state legacy taxes and (2) the revision of New Jersey's Estate Tax in response to any substantial revision of the Federal credit. Chapter 31 took effect immediately and applies to the estate of any resident decedent dying after December 31, 2001.

Gross Income Tax

P.L. 2001, C. 162 — Commuter Transportation Benefits
(Signed into law on July 17, 2001) Allows State and local government employers to offer qualified transportation fringe benefits to their own employees as an employee set-aside program. As a result, this act provides the full advantage under the Federal Internal Revenue Code of the tax incentives for qualified transportation fringe benefits recently extended under Federal tax law in the Federal Transportation Equity Act for the 21st Century (TEA-21), Title IX of Pub. L.105-178. The legislation allows State and local employees to choose to have the benefit deducted from their salary, receive any combination of the transportation benefits, or continue to receive the amount as salary, and allows the State and local governments and employees to take advantage of the Federal tax benefits.

For New Jersey gross income tax purposes, the exclusion provided for employer-provided commuter transportation benefits shall not apply to any commuter transportation benefit unless such benefit is provided in addition to and not in lieu of any compensation otherwise payable to the employee.

The act also amends the Travel Demand Management Program in the Department of Transportation (DOT) to make the DOT program similar to (but not the same as) the Federal program and makes some technical updates to that program. The act makes the DOT trip reduction tax benefits (which, unlike the Federal benefits, allow an employee to exclude the benefits from income only when the benefits are offered in addition to, rather than instead of, cash salary) comply with the same annual levels as the Federal benefits, effective for 2002. So as not to take

away any current State benefits, but also allow the State and Federal benefits at the same levels, the State benefits are increased to $1,200 annually beginning in 2002, when the Federal transit benefits are also scheduled to increase to $1,200 annually.

Additionally, Chapter 162 clarifies an important part of the New Jersey Gross Income Tax effects of the 1998 TEA-21 tax changes, which allow the "flip-side" of salary reductions: employers can save money by paying their employees to not take employer-provided parking. Usually the election of this option by one employee would have the tax effect of making every other employee's parking taxable, but the same provision that allows the salary reductions also permits the non-taxation of employees who don't cash out of their parking. Chapter 162 took effect immediately.

P.L. 2001, C. 217 — Checkoff for NJ-AIDS Services Fund
(Signed into law on August 24, 2001) Allows taxpayers to make a voluntary contribution to the "NJ-AIDS Services Fund." This act took effect immediately and applies to taxable years beginning on or after January 1, 2002.

P.L. 2001, C. 273 — Checkoff for Literacy Volunteers of America–New Jersey
(Signed into law on December 26, 2001) Allows taxpayers to make voluntary contributions on their gross income tax returns for literacy training, technical assistance, and program development. This act took effect immediately and applies to taxable years beginning on or after January 1, 2002.

P.L. 2001, C. 305 — Checkoff for New Jersey Prostate Cancer Research Fund
(Signed into law on January 2, 2002) Allows taxpayers to make voluntary contributions on their gross income tax returns to the New Jersey Prostate Cancer Research Fund for prostate cancer research. This act took effect immediately and applies to taxable years beginning on or after January 1, 2003.

Local Property Tax

P.L. 2001, C. 310 — Financing for Local Development Projects
(Signed into law on January 3, 2002) Broadens the mechanisms available to municipalities to finance local development projects. Certain provisions of the bill are designated as the "Redevelopment Area Bond Financing Law." These provisions allow a municipality that has designated a redevelopment area pursuant to the Local Redevelopment and Housing Law (N.J.S.A. 40A:12A-1 et seq.) to issue bonds that would be secured by payments in lieu of taxes under a tax abatement agreement and/or special assessments on property benefiting from the improvements provided.

Other provisions of the bill are designated as the "Revenue Allocation District Financing Act." These provisions authorize a municipality to establish one or more areas as a revenue allocation district and to designate a district agent to implement a development plan for the district. The ordinance creating the district would be submitted to the Local Finance Board, and must be approved by the board. After the creation of the district, the district agent could issue bonds or notes to finance the development of specific projects or to finance the infrastructure necessary to facilitate development within the district. This law took effect on March 4, 2002.

P.L. 2001, C. 312 — Palisades Interstate Park Commission Land Exempt From Roll-Back Taxes
(Signed into law on January 3, 2002) Exempts land acquired by the Palisades Interstate Park Commission for conservation and recreation purposes from the imposition of roll-back taxes pursuant to the Farmland Assessment Act of 1964. When land receiving farmland assessment is converted to a use other than agricultural or horticultural, the land is subject to additional taxes, known as "roll-back taxes," equal to the benefit for the current year and the two preceding years. This act took effect immediately.

P.L. 2001, C. 354 — Exemption for Property of Firefighters' Organizations
(Signed into law on January 6, 2002) Provides that when the property of an exempt New Jersey firefighter's association, firefighter's relief association, or volunteer fire company is used for an income-producing activity unrelated to the organization's primary purpose, the property remains exempt from property tax even if this activity exceeds 120 days annually provided the net proceeds are used in furtherance of the organization's primary purpose or for other charitable purposes. This change is effective retroactively to January 1, 1998.

P.L. 2001, C. 438 — Steel Outdoor Advertising Signs
(Signed into law on January 10, 2002) Clarifies that steel outdoor advertising signs and their steel supporting structures are not considered real property. However, the cement foundation, all underground piping, and electrical wiring up to the point of connection with the supporting structure is considered real property. This act took effect

immediately and applies to assessments made after enactment.

Miscellaneous

P.L. 2001, C. 93 — Individual Development Accounts
(Signed into law on May 10, 2001) Establishes the New Jersey Individual Development Account Program within the Department of Community Affairs and appropriates $2 million to create an Individual Development Account Fund. The fund will be used to provide grants to community-based organizations to implement the program and to provide a State match of $1 for every $1 of earned income deposited into an individual development account by a participant, up to a maximum of $1,500 per calendar year. Persons eligible to participate in the program must be adults with an annual household gross income that does not exceed 200% of the official poverty level. Funds accumulated in an individual development account may be withdrawn by the account holder, with the approval of the community-based organization, for three purposes only: qualified post-secondary educational expenses, qualified acquisition costs of a primary residence, or qualified business capitalization expenses.

Monies deposited into or withdrawn from an individual development account, including interest from the account, are exempt from New Jersey Gross Income Tax. In addition, the monies deposited in an individual development account and the interest income shall not be taken into account in determining eligibility for, or the amount of, assistance under State and Federal means-tested programs. The legislation took effect November 6, 2001, except for the section pertaining to the development of necessary regulations, which took effect immediately.

P.L. 2001, C. 155 — Delineated Municipal Areas
(Signed into law on July 13, 2001) Revises the Local Redevelopment and Housing Law to provide that a delineated area in a municipality may be determined to be in need of rehabilitation if more than half of the housing stock in that area is at least 50 years old, or a majority of the water and sewer infrastructure in that area is at least 50 years old and is in need of repair or substantial maintenance. This legislation also expands the definition of a delineated area to include current exemptions and abatements allowable. Chapter 155 took effect immediately.

P.L. 2001, C. 221 — Casino Reinvestment Development Authority Urban Revitalization Act
(Signed into law on August 24, 2001) Establishes the Casino Reinvestment Development Authority urban revitalization incentive program to be administered by the Casino Reinvestment Development Authority (CRDA). The program aims to facilitate the next phase of Atlantic City's development into a destination resort and to assist urban areas throughout the State with development and revitalization projects.

To be eligible for project grants, a casino licensee is required to submit a project proposal to, and receive approval from, the CRDA and the Department of Community Affairs, to invest a minimum of $20 million of its investment alternative tax obligations to develop an entertainment-retail project or community and housing development project, in $10 million increments for one or more such projects, in an urban area outside of Atlantic City. A casino licensee approved for participation in the incentive program is further required to extend its investment alternative tax obligations with the CRDA to 35 years from the current 30-year requirement. The bill requires the licensee's investment alternative tax obligations during the additional five years to be divided in such a way that Atlantic City receives 25%, South Jersey receives 25%, and North Jersey receives 50%. The bill took effect on October 23, 2001.

P.L. 2001, C. 248 — September 11 Terrorist Attacks
(Signed into law on October 4, 2001) The "New Jersey Terrorism Victims' Assistance Act of 2001" authorizes the Governor to expedite, by waiving certain administrative requirements, the payment of State benefits or the provision of assistance under State programs to victims and families of victims of the September 11, 2001, terrorist attacks on the United States; and to extend, without interest or penalty, deadlines for certain filings with, and payments to, State agencies. The legislation also allows governing bodies of municipalities to waive interest on delinquent obligations for those who suffered personal or business losses as a result of the attacks. This legislation took effect upon enactment and expired on December 31, 2001.

P.L. 2001, C. 311 — Municipal Landfill Site Closure, Remediation, and Redevelopment Act Amended
(Signed into law on January 3, 2002) Amends P.L. 1996, C. 124, to allow Pinelands municipalities to be eligible for redevelopment projects, and special tax benefits provided therein, on land where a municipal landfill is or has been located. Under the bill, a redevelopment project of this nature must be consistent with the recommendations of the

pilot program for rural economic development developed by the Pinelands Commission pursuant to section 2 of P.L. 1997, C. 233. This law took effect immediately.

P.L. 2001, C. 323 — New Jersey Wine Promotion Account
(Signed into law on January 4, 2002) Increases the amount dedicated to the New Jersey Wine Promotion Account in the Department of Agriculture from $0.20 to $0.47 per gallon on the sale of wines, vermouth, and sparkling wines produced by New Jersey wineries. This law took effect immediately.

P.L. 2001, C. 404 — Open Public Records Act
(Signed into law on January 8, 2002) Expands access to public records to include all government records and protects certain government records from public disclosure.

The bill also establishes a Government Records Council to facilitate the resolution of disputes regarding access to government records and a temporary Privacy Study Commission to study privacy issues raised by the collection, processing, use, and dissemination of information by public agencies.

The provisions establishing the Privacy Study Commission took effect immediately, and expire on the date the Commission submits its report to the Governor and the legislature. The remainder of the act took effect on July 7, 2002.

P.L. 2001, C. 415 — Neighborhood Revitalization State Tax Credit Act
(Signed into law on January 8, 2002) Establishes a tax credit as an incentive to businesses to invest in neighborhood revitalization and preservation projects sponsored by nonprofit corporations. Business entities which contribute financial assistance to a nonprofit sponsor may be granted a certificate authorizing a credit to be applied against taxes on certain business income.

The tax credit may be granted in an amount up to 50% of the approved assistance provided to a nonprofit organization to implement a qualified project. The credit allowed may not exceed $500,000 or the total amount of tax otherwise payable by the business for any taxable year, whichever is less, and may not exceed statutory limits on the tax for which a credit is claimed. The bill authorizes no more than $10 million in tax credits in any one year. Chapter 415 took effect on July 1, 2002.

P.L. 2002, C. 6 — Tax Amnesty
(Signed into law on March 18, 2002) Establishes a 60-day amnesty period to end no later than June 10, 2002, for the payment of any outstanding State tax liabilities due on or after January 1, 1996, and prior to January 1, 2002. During the amnesty period, a taxpayer who has failed to pay any State tax can pay the tax without being liable for interest, cost of collection, or civil or criminal penalties normally imposed under State law.

Amnesty will not be available to any taxpayers under criminal investigation or charge for any State tax matter. Eligible taxpayers who fail to pay the tax owed during the established amnesty period will be subject to a 5% penalty which cannot be waived or abated, in addition to all other penalties, interest, or costs of collection. This act took effect immediately.

P.L. 2002, C. 34 — Fees and Penalties
(Signed into law on July 1, 2002) Establishes, increases, and modifies fees and penalties imposed by and on behalf of the State. The legislation, among other things, increases certain commercial recording filing fees for corporations and other business entities to be paid to the State Treasurer; institutes a $50 fee to be charged by the Division of Taxation for each check issued for payment of any State tax or penalty that is returned due to insufficient funds or stop payment order; and imposes a new $2 per day fee to be called the “Domestic Security Fee” for each motor vehicle (passenger automobile, truck, or semitrailer) that is rented from a location in this State. The law took effect on July 1, 2002.

Property Tax Relief Programs

P.L. 2001, C. 251 — Property Tax Reimbursement
(Signed into law on October 30, 2001) Increases the income eligibility requirements for base year 2000 to $37,174 for single applicants and to $45,582 (combined income) for married couples. The new income limits will be subject to a cost-of-living adjustment based on the corresponding adjustment in the annual maximum social security benefit. Chapter 251 took effect immediately and applies retroactively to base year determinations for tax year 2000 and thereafter. The new income limits will affect only property tax reimbursement applications for tax year 2001 and thereafter.

Public Utility Taxes

P.L. 2001, C. 433 — Transitional Energy Facility Assessment Phase-Out Changed
(Signed into law on January 8, 2002) Freezes transitional energy facility assessment (TEFA) unit rate surcharges at calendar year 2001 rates for 2002 through 2004 and reduces that surcharge ratably for 2005 through 2006. The act took effect immediately and is retroactive to January 1, 2002.

P.L. 2002, C. 3 — Energy Tax Receipts Property Tax Relief Fund Distribution Date Changed
(Signed into law on March 18, 2002) For funds distributed after January 1, 2002, extends by 15 days (from on or before June 30 to on or before July 15) the time period for distribution of a portion of the State aid paid from the Energy Tax Receipts Property Tax Relief Fund to municipalities operating on a calendar year basis. This act took effect immediately.

Sales and Use Tax

P.L. 2001, C. 322 — Exemption for Wastewater Treatment Equipment
(Signed into law on January 4, 2002) Exempts from sales and use tax sales of wastewater treatment and conveyance equipment provided the Department of Environmental Protection determines that the operation of the equipment and the reuse of wastewater effluent that results will be beneficial to the environment.

The bill requires the equipment purchaser to pay any applicable tax and apply for a refund after showing the equipment has been put to an exempt use. The law took effect immediately and applies to sales made after enactment.

P.L. 2001, C. 347 — Urban Enterprise Zone Benefits Extended
(Signed into law on January 6, 2002) Amends P.L. 1983, C. 303 (C.52:27H-61 et seq.) and extends the life of an urban enterprise zone after the expiration of its third five-year period of designation if the municipality has an annual average of 2,000 or more unemployed persons or an average annual unemployment rate higher than the State average annual unemployment rate. This extension allows for the replacement of the final five-year period with a sixteen-year period during which the municipality receives a percentage of the sales tax revenues, according to a formula provided in the law, until the final year.

In addition, the law allows for the designation of an urban enterprise zone-impacted business district in an economically distressed business district adjacent to two or more urban enterprise zones. Certain businesses in these qualified districts are permitted to collect sales tax at the same reduced rate as qualified businesses in the adjacent urban enterprise zone.

Finally, the law provides for the designation of three additional urban enterprise zones, including a joint municipal zone. This law took effect immediately, with the exception of certain sections which took effect on April 1, 2002.

P.L. 2001, C. 411 — Refund Program for Hurricane Floyd Victims Extended
(Signed into law on January 8, 2002) Provides a six-month extension of the sales and use tax refund program for flood victims of Hurricane Floyd.

The law extends the period in which purchases of household goods, home repair materials, and replacement motor vehicles must have been made to March 31, 2001, and extends the period for claiming the sales and use tax refunds on those purchases to September 30, 2001. This act took effect immediately.

P.L. 2001, C. 431 — Streamlined Sales Tax Project
(Signed into law on January 8, 2002) Authorizes New Jersey participation in discussions of the Streamlined Sales Tax Project in an effort to simplify and modernize sales and use tax collection and administration. The project's proposals will incorporate uniform definitions within tax bases, simplified audit and administrative procedures, and emerging technologies to reduce the burden of tax collection. Chapter 431 took effect immediately.

Spill Compensation Tax

P.L. 2001, C. 424 — Cap Limitations Altered
(Signed into law on January 8, 2002) Alters certain taxes and caps on tax due pursuant to the Spill Compensation and Control Act.

This law provides that for major facilities established by the subdivision of a major facility which existed in 1986, including subsequent owners and operators, the total aggregated tax due shall not exceed 100% of the tax paid in 1999. It also allows a successor in certain corporate sales to be eligible for the same capped liability as the predecessor corporation.

The law sets the tax for any transfer of elemental antimony or antimony trioxide sold for use in the manufacture or for the purpose of a fire retardant at $0.015 per barrel and changes the cap on tax due for such transfers. The law also provides that hazardous substances not subject to regulation by the Department of Environmental Protection shall not be subject to taxation under the Spill Compensation and Control Act. Chapter 424 took effect on April 1, 2002.

Tobacco Products Tax

P.L. 2001, C. 448 — Tax Computation
(Signed into law January 11, 2001) Lowers the tax rate from 48% to 30% and changes the basis for the calculation of the tax. The tax will be imposed on the amount paid by the distributor to buy the products from the manufacturer rather than the amount received on sales from the distributor to vendors or consumers.

The law also provides that liability for the tax accrues when the distributor resells the tobacco products. In addition, the liability for installments of tax and the reporting and record keeping responsibilities of taxpayers are clarified.

This act took effect on March 1, 2002, and applies to tobacco products sold or disposed of on and after that date, except for those tobacco products for which the tax was paid prior to the effective date.

Unclaimed Property

P.L. 2002, C. 35 — Property Transfers
(Signed into law on July 1, 2002) Reduces the amount of time ("dormancy period") private financial organizations and business associations may hold property before transferring it to the State as unclaimed or abandoned property. It also clarifies and expands the types of properties that are to be transferred to the State after the dormancy period has expired. This act took effect immediately.

Uniform Procedure Law

P.L. 2001, C. 358 — Inspection of Certain Tax Records
(Signed into law on January 6, 2002) Adds an exemption to the taxpayer information confidentiality provisions of the State Tax Uniform Procedure law. The exemption allows the Attorney General or other legal representative of this State to inspect the reports or files of any tobacco product manufacturer for any period in which the manufacturer was not or is not in compliance with the law governing the administration of the Tobacco Master Settlement Agreement. This law took effect immediately.

COURT DECISIONS

Administration

Time Period to File Complaint
James Liapakis v. Director, Division of Taxation, decided April 27, 2001; Tax Court No. 004298-2000. The Division's final determination upholding the Division's gross income tax assessment was dated August 18, 2000, and mailed by certified mail on the same date. Therefore, the statutory 90-day period to file the complaint would end on November 16, 2000. Plaintiff's appeal with the Tax Court was filed on November 17, 2000. Plaintiff stated that Rule 1:3-3 of the Rules of Court, which grants three additional days to file the complaint, was inapplicable because the final determination was not sent by ordinary mail. However, plaintiff argued that the complaint is timely because the starting date for the running of the 90-day period is the date of service, August 21, 2000, per Rules 1:5-4 and 8:4-2.

The Court ruled that the Rules of Court could not be incorporated to determine or extend the statutory time period to file the complaint as the Rules relied upon applied when the parties were already in court. Therefore, the Court dismissed the complaint as untimely. The Court reasoned that the 1992 changes in the Uniform Procedure Law were the basis to distinguish the pre-1992 cases of *Harris, Pennoyer,* and *Holmdel* from the current case, that was filed after 1992.

Plaintiff appealed the Tax Court's decision. However, the appeal was dismissed because plaintiff failed to file a timely brief. (See *James Liapakis v. Director, Division of Taxation,* decided March 18, 2002; Appellate Division No. 005341-00TS.)

Responsible Person
Shellscape Decorating, LLC v. Director, Division of Taxation, decided September 7, 2001; Tax Court No. 004109-2000. The Division issued responsible person notices for sales tax liabilities to the husband and wife who each controlled 50% of the company. These liabilities were initially estimated due to the company's failure to file tax returns. Plaintiff claims that the returns were not filed through no fault of their own because they hired a management company to run the business and prepare and file the sales tax returns.

The Court found that the testimony indicated that the wife was knowledgeable in the area of accounting and related matters; had previously worked as an accountant; was the designated tax partner; and that she ran the shop, making most of the day-to-day operating decisions. The husband was found to be a sophisticated, knowledgeable businessman and a passive investor who was actively employed at another business. Both husband and wife signed or co-signed loans for the company. Although both had the authority to sign checks, the husband never exercised his authority.

The Court ruled that for sales tax purposes the wife was a responsible person of the business but that the husband was not. Although the husband had the authority to act, the Court ruled that authority alone was insufficient to classify him as a responsible person. The Court emphasized that there must be a duty to act.

Plaintiff also argued for abatements of interest and penalty claiming that the wife was a resident of a state that did not have a sales tax system and that a management company was engaged to prepare and file the sales tax returns. The Court ruled that interest would not be abated because it is a statutory definition of the time value of money to compensate for late payment. Penalties were not abated because penalties serve the purpose of acting as a deterrent to those who do not file their tax returns. Furthermore, the contractual relationship formed with the management company does not absolve the company and the responsible persons from their sales tax obligations.

Time Period to File Complaint
Richard and Charlotte Bingham v. Director, Division of Taxation, decided October 12, 2001; Tax Court No. 002303-2001. Plaintiff received the Division's Final Determination concerning the Division's gross income tax assessment. On June 19, 2000, plaintiff mailed a complaint to the Tax Court. The Tax Court received the complaint on June 21, 2000. Both parties agreed that the complaint must be filed by June 20; however, plaintiff argued that the date of mailing should be considered the date the complaint was filed.

Plaintiff's complaint was dismissed as untimely because the Legislature imposed a 90-day limit for filing the complaint with the Tax Court. The Court stated that the filing date of the complaint is the date the complaint is received by the Tax Court. The Court also relied on *Liapakis.*

Time Period to File Complaint
Martin Meyers v. Director, Division of Taxation, decided October 29, 2001; Tax Court No. 002022-2001. The Division's January 26, 2001, Final Determination finding that plaintiff was a responsible person for gross income tax

purposes was sent by certified mail on the same date. Plaintiff's appeal was filed on April 30, 2001. Both parties agreed that the statutory 90-day period to file the complaint ended on April 26, 2001. However, plaintiff claims the complaint is timely because he is entitled to three additional days to file the complaint pursuant to Rules of Court 8:4-2 and 1:3-3, which would include April 30 as April 29 fell on a Sunday.

In holding that the complaint was filed timely under Rules of Court 1:3-3, the Court respectfully disagreed with the *Liapakis* decision. The Court reasoned that the 1992 change in the Uniform Procedure Law would not affect the pre-1992 cases of *Harris, Pennoyer,* and *Holmdel* because N.J.S.A. 54:51A-18 is the same and refers to the use of the Rules of Court.

Timeliness of the Complaint and Summary Judgment
Harry and Susan Dashoff v. Director, Division of Taxation, decided November 26, 2001; Appellate Division No. A-3966-99T3. The Appellate Division reversed the Tax Court's summary judgment dismissal of taxpayer's complaint due to taxpayer's failure to timely protest the notice of assessment, which notice was returned to the Division as unclaimed. The Appellate Division ruled that the Division of Taxation's mailing of the notice is presumptive evidence of receipt that may be rebutted. Taxpayer alleges that he never received any notice of certified mail. Accordingly, the Appellate Division remanded the case to the Tax Court for an evidentiary hearing regarding a full factual picture of service of the notice.

Responsible Person
David Lee v. Director, Division of Taxation, decided January 11, 2002; Tax Court No. 001156-2001. Plaintiff was the sole officer of the corporation Exterior Power Sweeping (EPS). EPS ceased business operations in September 1989. In 1991, the Division assessed sales and use tax against the corporation for the period October 1, 1983, to June 30, 1989. Sales and use tax returns were not timely filed with the Division for that period nor were they filed thereafter. EPS protested the assessment and the Division issued a Final Determination in 1993. EPS filed a complaint with Tax Court that vacated the assessment in 1997. The Division appealed and the Appellate Division reinstated the assessment on April 30, 1999. On May 21, 1999, the Division issued a Notice of Finding of Responsible Person Status to Mr. Lee for the sales and use tax liabilities of EPS.

Plaintiff did not really dispute that he is a responsible person of EPS; however, plaintiff claimed that the responsible person notice was inequitable and barred by either laches or estoppel, or both. The Court would not set aside the assessment on the basis of laches or estoppel. The Court found that plaintiff is chargeable with knowledge of the statutes and his admitted actual knowledge renders less forceful his equitable arguments. Plaintiff did not demonstrate detrimental reliance on any action or inaction of the Division and failed to demonstrate that the Division deferred sending the responsible person notice to plaintiff so that interest would accrue. Furthermore, there is a general reluctance of the courts to grant estoppel against a public official entity.

Plaintiff also claimed that the May 21, 1999, responsible person notice was untimely due to the three-year statute of limitation period. Although no returns were ever filed, plaintiff alleges that the providing of information to the Division during the audit was a de facto filing of those returns. The Court rejected the theory of de facto filing. However, the Court stated that even if it accepted de facto filing, the statute did not limit the time period to collect taxes from the responsible person that were determined to be due within three years of the alleged de facto filing date.

Plaintiff filed a motion for reconsideration that was denied on February 22, 2002. Thereafter, plaintiff appealed the Tax Court's decision to the Appellate Division.

Time Period to File Complaint
Raymond Zola v. Director, Division of Taxation, decided February 8, 2002; Tax Court No. 002233-2001. The Division issued and mailed a final determination on March 2, 2001. Plaintiff received the final determination on March 7, 2001. About 9:30 p.m. on May 31, 2001, plaintiff e-mailed the Division a request for information. On June 1, 2001, plaintiff sent a letter to the Tax Court Clerk essentially requesting forms and information. The Tax Court Clerk recognized the filing date as June 18, 2001.

The Tax Court dismissed plaintiff's complaint as untimely, ruling that the 90-day statutory period began on March 2, 2001, and ended on May 31, 2001. Plaintiff claimed that Court Rule 1:5-4(b) stated that delivery is upon acceptance for certified mail and therefore the June 1, 2001, filing was within time. The Court opined that the court rules no longer apply due to the repeal of N.J.S.A. 2A:3A-4.1, which tied the 90-day jurisdiction period to appeal to the court rules. (See *Heico Corporation v. Director, Division of Taxation*).

Time Period to File Complaint
Portugese Spanish Palace Corp., Maria Freitas, Anthony Freitas, Fernando Brito, and Elizabeth Brito v. Director, Division of Taxation, decided April 17, 2002; Tax Court No. 002060-2001. The Division issued Portuguese Spanish Palace Corp. (PSP) a Notice of Assessment Related to Final Audit Determination (Notice of Assessment) on June 19, 2000. On November 28, 2000, the Division issued PSP a Notice and Demand for Payment (Demand) and issued the individual plaintiffs a Notice of Finding of Responsible Person Status. Plaintiffs' accountant sent a letter dated February 12, 2001, requesting a hearing with respect to audits of the taxpayer with no reference to the individual plaintiffs. By letter dated February 22, 2001, the Division denied the request for a hearing and stated that the taxpayer had 90 days to appeal this determination to Tax Court. Ninety-two days later, on May 25, 2001, PSP and the individual plaintiffs filed a complaint in Tax Court.

As to PSP, the Court dismissed the complaint holding that the February 12, 2001, request for a hearing was beyond the statutory 90-day period to protest the June 19, 2000, Notice of Assessment. Furthermore, the Demand notice neither granted new appeal rights nor extended PSP's time period to file a protest or request for hearing from the Notice of Assessment.

As to the individual plaintiffs, the Court found that plaintiffs' February 12, 2001, request for a hearing did not incorporate or even refer to the individual plaintiffs as the letter stated it was requesting a hearing concerning the audits of the taxpayer. Consequently, the Court dismissed the complaint as untimely as it was beyond the 90-day time period to file a complaint of the Notice of Finding of Responsible Person Status.

Calculation of 90-Day Time Period to File Complaint
Heico Corporation v. Director, Division of Taxation, decided April 24, 2002; Tax Court No. 002638-2001. The Division's final determination regarding sales and use tax and corporation business tax assessments was dated and sent by certified mailed on April 2, 2001, to the plaintiff and plaintiff's representative. Return receipts indicate that the final determinations were received on April 9 and April 4, 2001, respectively. The final determination stated that taxpayer had 90 days from the date of the letter to appeal the Division's decision to the Tax Court.

Certified mail receipts indicate that plaintiff mailed items to the Tax Court on June 30, 2001. Plaintiff's complaint was stamped received by the Tax Court on July 3, 2001, at 2:39 p.m.

The Court found that the 90th day from the April 2, 2001, date of the final determination was July 1, 2001. However, July 1, 2001, was a Sunday. Therefore, the filing date was extended to July 2, 2001. As filing occurs upon the Tax Court's receipt of the complaint, the complaint was considered filed on July 3, 2001, one day late.

In its historical review of the legislation, Rules of Court, and case law concerning the calculation of the 90-day period to appeal final determinations, the Court acknowledged that in previous cases the Rules of Court were applied to determine whether the complaint was filed timely. More specifically, R. 8:42-2(a) and R. 1:5-4(b) essentially started calculating the 90-day period from receipt of registered or certified mail. Pursuant to these rules, this complaint would be considered timely filed. Furthermore, R. 1:3-3 granted plaintiff three extra days to file a complaint, which would extend the filing date to July 5, 2001, and therefore, plaintiff's complaint would also be considered to be timely filed under this rule.

The Court found that R. 1:3-3 was revised. Previously this rule applied to service by mail, whether ordinary or certified. Effective September 1, 1996, this rule only applies where service is effectuated by ordinary mail. Consequently, this rule was found to be inapplicable here regardless of whether the Rules of Court apply because the April 2, 2001, final determination was delivered by certified mail.

Due to revisions to the Rules of Court and the statutes, the Court held that the Rules of Court no longer apply to the calculation of the 90-day period to appeal from the Division's final determination. The Court opined that the specific repeal of N.J.S.A. 2A-3A-4.1 with its reference to the 90-day appeal period and reference to the Rules of Court and its replacement by N.J.S.A. 2B:13-1 to -15, which has no reference to the Rules of Court, was evidence that the Rules of Court no longer apply to the calculation of the 90-day period to appeal the Division's determinations. Furthermore, the amendment of N.J.S.A. 54:49-18(a) to state that the appeal period commences from the date of the Division's final determination letter without any reference to the Rules of Court was also found to be indicia that the Rules of Court do not apply to the calculation of the 90-day appeal period. The Court noted that when a complaint may be filed is a matter of jurisdiction as opposed to a matter of practice and procedure. Finding that the date of the final determination is the date the notice

was mailed to the taxpayer, the Court ruled that the 90-day period commences on the date of the mailing and that the Division has the burden of establishing that date.

Motion for Reconsideration
Heico Corporation v. Director, Division of Taxation, decided April 24, 2002; Tax Court No. 002638-2001. On the motion date, plaintiff was not represented by legal counsel due to its failure to secure one after three notices. Plaintiff did not file any papers in opposition to the Division's motion. The motion was treated as uncontested and the Court dismissed the complaint as untimely filed.

Returning with legal counsel, plaintiff filed a motion for reconsideration. The Court granted the motion in the interest of justice because it did not consider plaintiff's legal arguments when rendering its determination.

Corporation Business Tax

Regular Place of Business
River Systems, Inc. v. Director, Division of Taxation, decided December 21, 2001; Tax Court No. 5627-1999; *Rubachem International, LTD. v. Director, Division of Taxation,* decided December 21, 2001; Tax Court No. 5628-1999; *Rubachem, Inc. v. Director, Division of Taxation,* decided December 21, 2001; Tax Court No. 5629-1999. The three plaintiffs are organized as New Jersey C corporations and share an office in New Jersey where all their administrative activities are performed. They are all separate companies and therefore each files a separate corporation business tax (CBT) return. River Systems and Rubachem, Inc. market and sell computer-related products and light bulbs while Rubachem International markets and sells industrial and commercial cleaning products and light bulbs.

General Litesearch, Inc. (Litesearch), a related but separate company, employees solicit sales on behalf of the three plaintiffs from a leased New York office building. When Litesearch solicits a sale, the Litesearch employee enters the information into a computer. The relevant plaintiff receives the information in New Jersey and arranges for the shipping of the item. Some products are shipped from the New Jersey location; however, most products are primarily drop-shipped by unrelated, third-party manufacturers. No products are shipped from the New York location. Customer payments are remitted directly to the relevant plaintiff at the New Jersey office. The revenues as well as losses, if payment is not remitted, from the sale of products made by Litesearch employees are the income or accounts receivable of the plaintiff whose products are sold.

Although Litesearch pays the payroll expenses of the employees at the New York location, Litesearch is reimbursed by the plaintiff for each employee who sells its product. Litesearch also has employees on its payroll that work out of plaintiffs' New Jersey location. Litesearch's supervision and management personnel oversee all employees at the New York location and their payroll costs are charged to the individual plaintiffs based upon sales volume. There is no written contract describing the payroll reimbursement arrangement.

The New York office building that Litesearch operates from is owned by Lemar Investment Company (Lemar), also a related but separate company. The plaintiffs pay a fixed amount for rent and one plaintiff pays for the other building costs, such as utilities, to Lemar. Both amounts are allocated to plaintiffs at the end of the year based upon each plaintiff's sales volume. Each plaintiff is charged for telephone usage per the specific calls made on behalf of each plaintiff. However, there is no written contract describing this arrangement nor is there a lease providing for rent.

Plaintiffs claim that they are entitled to allocate their income between New Jersey and New York. New York accepted plaintiffs' amended returns allocating income between New York and New Jersey.

The Court held that plaintiffs were not entitled to allocate income to New York in the computation of the CBT under N.J.S.A. 54:10A-6 because they did not maintain a regular place of business outside of New Jersey. In order for an office to qualify as a "regular place of business," the taxpayer must own or rent the facility in its own name, maintain it and be directly responsible for the expenses incurred, and occupy and use the premises by employing at least one regular employee who is in attendance during normal working hours. Although plaintiffs paid rent at the New York location, there was no written lease that provided for the rent payments and therefore it was not certain whether the payments were made on behalf of Litesearch or plaintiffs. The Court determined that none of the Litesearch employees at the New York location were regular employees of any of the plaintiffs. A regular employee is defined as one who is under the control and direction of the employer. The fact that plaintiffs reimbursed Litesearch for the actual cost of each telemarketer who made sales on its behalf did not qualify the telemarketer as an employee of the plaintiff. Moreover, there

was no written contract concerning this reimbursement arrangement. Citing *Shelter Development Corp.*, the Court ruled the activities of a related corporation cannot be attributed to the New Jersey corporation at issue.

The Court also held that plaintiffs were not entitled to allocate income under N.J.S.A. 54:10A-6 through N.J.S.A. 54:10A-8 because the allocation factor properly reflects income attributable to New Jersey. Section Eight grants the Division discretion to make adjustments to properly reflect net income attributable to New Jersey where the allocation factor does not. The Court found that plaintiffs had no employees and no property anywhere other than New Jersey.

Plaintiffs have appealed the Tax Court's decision to the Appellate Division.

Pre-Merger Net Operating Losses
A.H. Robins Company, Inc. v. Director, Division of Taxation, decided February 21, 2002; Tax Court No. 005682-95. A.H. Robbins (Old Robins) was incorporated in Virginia and filed New Jersey corporation business tax (CBT) returns. After facing liability claims on its Dalkon Shield product, it filed for Chapter 11 bankruptcy. In December 1989, American Home Products Corporation (AHP) acquired Old Robins by structuring a merger of Old Robins into "New Robins" pursuant to the approved plan of reorganization. AHP paid approximately $2 million to New Robins and became the sole shareholder. The business address of New Robins remained the same as that of Old Robins; however, New Robins was incorporated in Delaware. In the subsequent years following the merger, New Robins sought to deduct pre-merger net operating losses (NOL) incurred by Old Robins.

The Tax Court held that New Robins could not utilize the NOL incurred by Old Robins prior to the merger. The Court dismissed all of plaintiff's arguments. First, the Court ruled that there was nothing in the Bankruptcy Code that preempted the CBT statutes regarding post-reorganizational income tax liabilities of a nondebtor entity noting that New Robins was not the debtor entitled to Bankruptcy Code protections. Secondly, the Court found that N.J.A.C. 18:7-5.13 makes clear that an NOL may not be carried over by a taxpayer that changes its state of incorporation. The Court relied on *Richards Auto City* where the New Jersey Supreme Court rejected the theory that continuing the same business is a persuasive factor justifying the recognition of the tax status of the merged corporation. Although Federal tax law permits the survivor of a merger to utilize the NOL, the CBT Act deals with single corporations and not two or more successive corporations.

A.H. Robins has appealed the Tax Court's decision to the Appellate Division.

Nonprofit Corporations
Sussex Rural Electric Cooperative v. Director, Division of Taxation, decided March 27, 2002; Tax Court No. 001790-2000. Plaintiff claims it is a not-for-profit corporation and therefore is exempt from corporation business tax (CBT) even though it was organized as a for-profit, Title 14A corporation. Under its certificate of incorporation, there was language indicating that it was a not-for-profit corporation. The Court held that the corporation was not eligible for exemption from CBT under N.J.S.A. 54:10A-3(e) because it was organized as a for-profit, Title 14A corporation. The Court stated that tax consequences flow from the form in which the taxpayer elects to do business.

Gross Income Tax

Six-Year Statute of Limitations/Death Benefits
Joyce H. Eiszner v. Director, Division of Taxation, decided July 19, 2001; Appellate Division No. A-3339-99T2.

Death Benefits. At the time of his death, plaintiff's husband was a New Jersey (NJ) resident who was employed in NJ by CPC International, Inc. (CPC). CPC provided performance plans to its current employees that consisted of stock and stock options that were contingently granted. However, if an ex-employee died, retired, became disabled, or left by reason of voluntary separation, the board of directors had discretion as to whether a payment would be made. Immediately after the death of plaintiff's husband in September 1990, the board of directors authorized payment to her husband's estate. The payment was not distributed until 1992 and transferred to the husband's revocable trust, an NJ resident trust. The trust distributed these monies to plaintiff.

The Tax Court held that the payment was not a death benefit because death did not trigger the payment. The Tax Court found that the CPC Plan made payments as a result of participation in the Plan and not necessarily because of death as other employment-terminating factors, disability, retirement, and voluntary separation, might also result in a payment. Therefore, the Tax Court ruled that the payment was a performance award attributable to the deceased em-

ployee's former services. It thus constituted deferred compensation under an incentive compensation plan and it is includable in the plaintiff's gross income. On appeal, the Appellate Division agreed with the Tax Court. The Appellate Division added that to accept plaintiff's argument that the payment was a death benefit would allow business individuals to time discretionary payments at death to avoid taxation.

Six-Year Statute of Limitations. Both the husband's estate and trust each filed a 1992 gross income tax fiduciary return in 1993. The estate return included the CPC payment received under the performance plan and described it as shares and performance award. The return for the estate identified that the total amount was distributed to the beneficiary trust and listed plaintiff's address, social security number, and her status as an NJ nonresident. The trust return reported the entire income from the estate and noted the distribution of that amount to the plaintiff as beneficiary.

As plaintiff relocated her residence to Illinois in July 1991, she filed a 1992 NJ gross income tax nonresident return seeking a refund of first quarter estimated tax payments inadvertently paid to NJ. Attached to the NJ return was her 1992 Illinois individual tax return with the "Supplement to Illinois" 1992 Federal Form 1040, U.S. individual income tax return. Although the NJ return reported the net amount of CPC's payment to her husband under "Amount of Gross Income Everywhere," it did not explain the nature and source of the income, it reported no income from NJ sources as well as no NJ tax due, and the NJ estate and trust fiduciary returns were not attached. Approximately four years after plaintiff's filing of her 1992 NJ nonresident return, the Director sent a Notice of Deficiency for the amount of tax owing on the CPC Performance Plan payment.

Utilizing a common sense approach to determine whether plaintiff's NJ return's disclosure provided a "clue" as to the nature of the income omission, the Tax Court held that the Director's assessment was not time-barred by the three-year statute of limitations because plaintiff's NJ nonresident and the attached Illinois and Federal returns' disclosure of the source or nature of the income was inadequate to apprise the Director that the income was NJ sourced. The Division had six years in which to assess additional tax under N.J.S.A. 54A:9-4(d). The Tax Court noted that the required Schedule E was not submitted to the Division along with the Federal return and that the Schedule E would have identified the source of the funds. Furthermore, the Court ruled that the Director has no duty to cross reference different returns filed by different entities not attached to plaintiff's individual return. The Appellate Division agreed finding it significant that plaintiff's NJ return did not identify the income as from an NJ source.

Reporting of S Corporation's Sale

Miller v. Director, Division of Taxation, decided August 20, 2001; Tax Court No. 004040-2000. In 1996, plaintiff was the principal shareholder of a subchapter S corporation that sold virtually all of its assets. This significant asset sale was not in the ordinary course of the S corporation's trade or business. Thereafter, the S corporation was liquidated and paid plaintiff a liquidating dividend that included the proceeds of the asset sale.

New Jersey's NJ-K-1 provides only one line for reporting S corporation income titled the pro rata share of subchapter S income. Therefore, on plaintiff's Schedule NJ-K-1, the S corporation reported that plaintiff's distributive share was the total of the net gain on the asset sale and the income from operations. On plaintiff's New Jersey gross income tax return, plaintiff bifurcated that figure reporting the income from operations of the S corporation as plaintiff's pro rata share of S corporation income and the asset sale as a capital gain from which plaintiff deducted his stock basis in the S corporation as well as his losses from other investments. Pursuant to an audit of plaintiff, the Division combined the S corporation's gain from the asset sale with its income from operations to report it solely in the category of pro rata share of S corporation income. As a result of the audit reclassification, the Division did not allow a deduction for his basis in the S corporation stock and his losses from other investments.

The Court held that the S corporation's sale of corporate assets was reportable by plaintiff as a gain on the disposition of property because income earned outside of the ordinary course of trade or business retains its character when passed through to the S corporation shareholders. Moreover, the Court ruled that the pro rata share of S corporation income is income from the ordinary trade or business of the corporation. In support of its holding, the Court first looked to the legislative history and found that it was not the Legislature's intent to aggregate all categories of S corporation income under the pro rata share category. The Court noted that the Federal Schedule K-1 provides lines for separate items of income that are reported on separate lines of the Federal income tax return such that plaintiff's Federal Schedule K-1 properly reported the S corporation income from operations as a separate and distinct category from the net gain on the sale

of the S corporation assets. The Court added that the fact that the corporation liquidated and paid a liquidating dividend was further support for the characterization of this transaction as a gain on the sale of property.

In addition, the Court held that the plaintiff was entitled to deduct his basis in the S corporation stock from the passed through proceeds of the S corporation's sale of assets. The Court reasoned that this result was warranted because taxing the gross proceeds would be inconsistent with the New Jersey gross income tax's taxation of net gains and would be illogical with the *Koch* holding that forbid taxation on the return of capital. An appeal has been filed by the New Jersey Division of Taxation.

Partnership's Discharge of Indebtedness Income
Michael and Patricia Scully and James Scully v. Director, Division of Taxation, decided September 21, 2001; Tax Court No. 004076-1997. Plaintiffs Michael Scully and James Scully each own a 48.5% limited partnership interest and a 1% general partnership interest in Port-O-Call Associates, a New Jersey limited partnership (the "Partnership"). Additionally, each owns 50% of the corporate stock of a Pennsylvania corporation that owns a 1% general partnership interest in the Partnership.

The Partnership purchased a hotel with a $7 million mortgage. Subsequently, the mortgagee became insolvent and the mortgage was assigned to a corporation that acted as the receiver. Thereafter, the receiver sold the mortgage loan to Optimum Mortgage Investment Company for approximately $2 million less than the note's principal balance. Optimum's mortgage purchase was financed by the plaintiffs pursuant to an agreement that paid Optimum a fee and obligated Optimum to assign the mortgage to plaintiffs. Thereafter, plaintiffs assigned the mortgage to the Partnership.

The Partnership's Federal income tax return reported the current principal balance of the note as a capital contribution and the $2 million difference between the previous and current principal balance of the mortgage as debt-forgiveness income. The Partnership's Pennsylvania information return reported the same capital contribution but reported the $2 million difference as "Net profits from business…apportioned to Pennsylvania."

The Director determined that the Partnership realized discharge of indebtedness income in the amount of approximately $2 million, the difference between the prior mortgage principal balance and the amount of the mortgage principal when the plaintiffs contributed the loan to the Partnership which thereby discharged the mortgage debt. The Director contended that this amount is attributable to plaintiffs as discharge of indebtedness income that occurred "within a business entity" under N.J.S.A. 54A:5-1(k) and (b).

The issue before the Court was whether partners are subject to gross income tax on discharge of indebtedness income realized by the Partnership. Relying on *Smith v. Director* the Court determined that a partnership's discharge of indebtedness income must arise in the ordinary course of partnership business operations to be includable in the partner's gross income. Otherwise the discharge of indebtedness income would retain its character, and as such, discharge of indebtedness, is not a category of income subject to gross income tax.

The Director, Division of Taxation, has filed an appeal with the Superior Court, Appellate Division.

Untimely Filing of Petition
Joyce H. Eiszner v. Director, Division of Taxation, decided October 16, 2001; New Jersey Supreme Court No. M-314 September Term 2001 51,892. The New Jersey Supreme Court dismissed plaintiff's petition for certification due to lack of prosecution.

Partnership Versus Rental Income
Joseph DiBianca, et al. v. Director, Division of Taxation, decided October 26, 2001; Tax Court No. 004391-00. On its 1996 New Jersey gross income tax return, plaintiff reported $27,179 as net income from rents by netting a loss from residential real property reported on the Federal income tax return, Schedule E, with net rental income passed through from four partnerships as reported on the K-1 and NJK-1. The Director asserted a deficiency on the basis that the Schedule E $12,411 loss from residential realty (N.J.S.A. 54A:5-1d) could not offset plaintiff's $39,590 distributive share of partnership income (N.J.S.A. 54A:5-1k) pursuant to N.J.S.A. 54A:5-2, which prohibits the netting of intercategory income and losses.

Plaintiff relied upon the regulations. The Court reviewed the regulations and found that partnerships were required to determine their net profits from business in the same manner as an individual taxpayer would. As to rental income, the regulations state that where rental income is not received in the ordinary course of the conduct of a trade or business, the income shall be reported under subsection 5-1d. Conversely, to be included in a taxpayer's net profits from business, rental income must be received in the ordinary course of the conduct of a trade or business of

leasing property. Moreover, the regulations provide that a taxpayer is not deemed to be engaged in the conduct of a trade or business of leasing property unless substantial services are rendered in connection with the leasing properties.

Opining that the concept of ordinary business operations was relevant in construing the regulations, the Court relied on the New Jersey Supreme Court's opinion in *Smith*. There the Court determined that it was the Legislature's intent that the category "net profits from business" include income that would be categorized separately where it was not earned in the ordinary course of business; otherwise, the category net profits from business would virtually become a nullity. However, *Smith* stated that if the dividend and gain income represented income from passive partnership investments, then the income would have been reportable under their respective separate categories of income. After reviewing the categories of expenses reported on the partnerships' Federal Form 8825 such as floral supplies, maintenance and cleaning, commissions, insurance, legal and other professional fees, repairs, taxes, utilities, landscaping, snow removal, lawn care, and elevator maintenance, the Court ruled that the partnerships were actively operating the properties.

Turning to what constitutes a substantial service, the Court found that the regulations do not define the term. However, the regulations do state that the activity of net leasing a property does not constitute the conduct of a trade or business unless taxpayer is in the trade or business of dealing with such property and the property constitutes inventory or stock in trade of the partner. The Court determined that this language was incorporated as a result of the Appellate Division's ruling in *Newark Building Associates* where it was determined that the partnership's passive activities of filing documents required by law, accepting net rents, depositing the rents in its bank account, making payments to the mortgagee, and distributing the net proceeds to the partners was a net lease situation and did not constitute a business under the Unincorporated Business Tax Act. There the Appellate Division described the partnership activities as merely serving to maintain its existence as a partnership because the accounting, legal, and other partnership supervisory acts were performed by its attorneys for a stated annual fee plus disbursement for accounting fees.

Applying *Newark Building Associates* to the instant case, the Court ruled that the items of partnership expenses indicated a level of activity and services significantly in excess of those performed there. Applying *Smith* to the regulations, the Court held that the partnerships were involved in the active ordinary business operations of the buildings and that those operations constituted substantial services. The Court noted that it was the ordinary business operations of the partnerships to own and provide the necessary services to operate the buildings even though services constituted less than 35 hours per week. The Court stated that the focus was on whether the partnership, not the partner, is involved in the ordinary business operations. Therefore, the Court upheld the Division's assessment.

Plaintiff alternatively argued that the Division's remedy is against the partnership because they issued the NJK-1, not against the partner who compiled or filed returns in accordance with the NJK-1. The Court ruled that although the partners' NJK-1 forms were issued by the partnerships, this did not insulate the partners from tax liability even though tax return instructions state that income should be reported in accordance with the NJK-1. The Court ruled that the partner is responsible for proper and accurate reporting. The Court reasoned that otherwise partners could control their gross income tax liability by controlling the information reported in the NJK-1s that are thereafter issued to themselves.

Interest Deduction: Acquisition Indebtedness to Purchase S Corporation Stock

Sidman v. Director, Division of Taxation, decided November 14, 2001; New Jersey Supreme Court No. C-354 Spring Term 2001 51,806. The New Jersey Supreme Court denied plaintiff's petition for certification. In upholding the Tax Court, the Appellate Division previously held that a shareholder's interest payments to other shareholders for their S corporation stock were not deductible from the purchaser's pro rata share.

Partnership's Discharge of Indebtedness Income

Richard and Sharon Miller v. Director, Division of Taxation, decided November 27, 2001; Tax Court No. 000054-2001. Plaintiff Richard Miller is a partner of a New Jersey general partnership (the "Partnership"). The Partnership's only asset is one piece of real estate encumbered by a mortgage that is owned as real estate investment. This real estate is leased to a law firm some of whose partners are partners in the Partnership. When the real estate's value dropped significantly below the principal balance of the mortgage loan, the mortgagee reduced the principal balance upon the Partnership's request for a reduction.

The Partnership reported the reduction in the principal balance as other income on its Federal income tax return but did not report it on the Partnership's New Jersey tax

return. Plaintiff's Federal Schedule K-1 reported his proportionate share of the mortgage reduction as other income but did not report it on either plaintiff's Schedule NJK-1 or New Jersey gross income tax return. The Director determined that the mortgage reduction resulted in forgiveness of indebtedness income to the Partnership and thereby was includable in the partner's distributive share of partnership income.

The Court applied its legal analysis in *Scully* to the facts of this case. The Court noted that there were three differences between the cases most notably that in the instant case there was no question that the Partnership received discharge of indebtedness income and that here the real estate is owned as an investment as opposed to as a hotel and restaurant. As in *Scully*, the Court stated that discharge of indebtedness income "is taxable to a partner only if attributable to a partnership's ordinary business operations."

The Court ruled that the plaintiff was not subject to the gross income tax on the Partnership's discharge of indebtedness income because the income relating to the mortgage loan is not includable in the Partnership's net profits from business. The transaction involving the mortgage loan is in the nature of a capital transaction, not an ordinary business operation. Moreover, the Court added that even if the loan transaction constituted part of the partnership's ordinary business operations, the income-generating event is the reduction in principal balance, which is not part of the partnership's ordinary business operations.

The Director, Division of Taxation, has filed an appeal with the Superior Court, Appellate Division.

Keogh Plan Contributions
John and Barbara Reck v. Director, Division of Taxation, decided December 7, 2001; Appellate Division No. A-5379-99T3. Plaintiff husband is a partner in an accounting firm. The firm established a qualified Internal Revenue Code (IRC) section 401(a) Keogh Plan. Contributions on each partner's behalf were made by the partnership to the Keogh Plan. In calculating his distributive share of partnership income for the 1992 and 1993 tax years, plaintiff deducted these contributions. The Division denied the deductions on the basis that only 401(k) plan contributions were deductible.

The Tax Court held that the accounting firm's contributions on behalf of partners to the Keogh Plan were deductible in calculating the partner's distributive share of partnership income. In its determination, the Court ruled that the firm's Keogh Plan contributions for partners were ordinary and necessary deductible business expenses pursuant to N.J.S.A. 54A:5-1b, which defines net profits from business.

The Appellate Division reversed finding that the controlling statute was N.J.S.A. 54A:6-21 which stated that gross income does not include employer contributions on behalf of its employees to a 401(k) plan. Hence, the Court ruled that other contributions are not deductible even though not expressly prohibited. The Court relied on the legislative history of N.J.S.A. 54A:6-21, the regulations, and case law including *Dantzler*, *Mutch*, and *Sidman*. The Court also noted that *Koch v. Director* did not apply as it dealt with accounting principles and does not apply to cases involving the deductibility of retirement and pension plan contributions.

The New Jersey Supreme Court has granted the taxpayers' petition for certification.

Employee or Independent Contractor
Ersel G. Seiler v. Director, Division of Taxation, decided January 16, 2002; Tax Court No. 004237-2000. The Tax Court granted the Division's motion for Summary Judgment ruling that plaintiff was an employee of Allstate Insurance Company and not an independent contractor. The Division relied on information contained in plaintiff's divorce proceedings in the New Jersey Superior and Appellate Courts where plaintiff successfully argued that he was an employee of Allstate.

In his divorce proceedings, plaintiff asserted the following: (1) Compensation was governed by an agent compensation agreement with Allstate. (2) All premiums collected were treated in trust for Allstate. (3) Premiums were remitted to Allstate without any deduction for commission or expenses. (4) Plaintiff did not have a "book of business" that could be sold. (5) Another company, with Allstate's approval, hires and fires plaintiff's employees. (6) Plaintiff may hire employees with approval and Allstate may direct plaintiff to terminate employees. (7) Plaintiff establishes the compensation of some employees. (8) Plaintiff is paid by Allstate and receives a W-2 from Allstate. (9) Plaintiff's agency is part of Allstate's Neighborhood Office Program. (10) Plaintiff receives an expense allowance from Allstate that is tied to sales and can be used in any way but plaintiff is responsible for any expenses over the allowance. (11) Allstate owns most of the computers and all of the other office equipment. (12) Allstate assigns the phone number and

pays for and maintains the sign for plaintiff's agency. (13) Allstate designs and pays for all advertisements.

Reporting of S Corporation's Sale of Assets and Subsequent Liquidation

Joel and Judith Mandelbaum v. Director, Division of Taxation, decided May 17, 2002; Tax Court No. 004227-2000. Mandelbaum was a shareholder of Dalcomp, a Federal and New Jersey subchapter S corporation. In 1995, he and all the other shareholders sold all of their stock to Thompson Municipal Services. Later in that year, Thompson and the former Dalcomp shareholders filed an Internal Revenue Code section 338(h)(10) election, essentially a deemed sale of assets followed by a deemed liquidating distribution, with the Internal Revenue Service. On his 1995 gross income tax return, Mandelbaum reported the transaction as gain or income from the disposition of property after subtracting his stock basis. Mandelbaum later amended his 1995 gross income tax return, reporting the transaction as his net pro rata share of S corporation income after subtracting the cost of his stock. Also, Mandelbaum elected the installment method of reporting the income.

The Division disallowed the deduction for the stock basis from his S corporation income, disallowed the use of the installment method, and decided that the amount of his S corporation income was his proportionate stock ownership share of the corporation's net gain from the deemed sale of assets. The Division determined that the deemed liquidation resulted in an N.J.S.A. 54A:5-1c loss to Mandelbaum and that the loss could not be netted with the N.J.S.A. 54A:5-1p S corporation income due to the non-netting of intercategory income and losses rule under N.J.S.A. 54A:5-2.

The Court ruled that the I.R.C. 338(h)(10) election is not applicable to a New Jersey S corporation because there is no statute, interpretative regulation, or other formal promulgation interpreting or referring to the Gross Income Tax Act with respect to I.R.C. 338(h)(10) elections. The Court reasoned that a New Jersey taxpayer reading the Gross Income Tax Act provisions and the regulations thereunder would not be on notice that an I.R.C. 338(h)(10) election subjected him to any tax liability under the Gross Income Tax Act. The Court also refused to impute the Corporation Business Tax Act and regulations thereunder referring to the 338(h)(10) election to an S corporation shareholder as the acts are not in para materia. Due to the Division's inability to use I.R.C. 338(h)(10), the Court held that the transaction must be treated as a sale of stock and that the net gain, proceeds of the sale less adjusted basis, be taxed as a disposition of property under subsection 5-1c.

Alternatively, the Court stated that even if the Gross Income Tax Act applied to the I.R.C. 338(h)(10) election, the stock's basis would be deductible in determining gain or loss under subsection 5-1c in accordance with the Tax Court's previous holding in *Miller*. Finally, the Court ruled that the installment method of reporting is applicable to subsection 5-1c income.

Reporting of S Corporation's Sale of Assets and Subsequent Liquidation

George K. Miller, Jr. and Debra Miller v. Director, New Jersey Division of Taxation, decided June 17, 2002; Appellate Division No. A-658-01T2. Miller was the principal shareholder of a Federal and New Jersey subchapter S corporation. In 1996, the corporation sold virtually all of its assets to an unrelated corporation for about $5 million. Later, in that same tax year, the corporation paid a liquidating dividend to Miller that consisted primarily of the proceeds of the sale.

For New Jersey tax reporting purposes, Miller calculated his income by deducting his Federal basis in the stock from the Federal calculated amount of the liquidated dividend, the property distribution from the stock sale. Miller reported this amount as a gain under N.J.S.A. 54A:5-1c after netting it with other personal capital transactions, mostly losses.

The Division first computed the corporation's gain on its sale of assets as Miller's pro rata share of subchapter S income pursuant to N.J.S.A. 54A:5-1p. Consequently, this amount of gain was also added to Miller's basis in his corporate stock. Secondly, the liquidating payment was considered to be a sale of subchapter S stock in accordance with subsection 5-1c. This resulted in a loss primarily due to the increase in basis from the asset sale. As each of the above transactions resulted in separate categories of income and loss, the Division did not net the income derived from subsection 5-1p with the subsection 5-1c loss in accordance with N.J.S.A. 54A:5-2, which taxes income on a category-by-category basis and prohibits the netting of income and losses.

The Tax Court ruled for Miller. Although the Appellate Division concurred with the Tax Court's rejection of the Division's interpretation of the Gross Income Tax Act, it reversed and remanded the case because it disagreed with the Tax Court's solution. The Appellate Division found that the Division's methodology was supported by the Gross Income Tax Act's literal language, but that the result is to tax the return of capital, which is inconsistent with the legislative intent of subsection 5-1c and the New Jersey Supreme Court's opinion in *Koch*. However, the

Appellate Division also disagreed with the Tax Court's determination that subsection 5-1p did not include S corporation income outside of the ordinary trade or business and disagreed with the Tax Court, allowing Miller to deduct his Federal basis, rather than his New Jersey adjusted basis, to determine the amount of gain. The Appellate Division reasoned that if the Legislature had anticipated the facts in *Miller*, then it believed the Legislature would have provided that the two transactions be treated as a sale of stock to a third party with gain or loss being calculated under subsection 5-1c.

Insurance Premiums Tax

Retaliatory Tax
Aetna v. Director, Division of Taxation, decided March 18, 2002; Tax Court No. 002371-2001. Pursuant to N.J.S.A. 17B:23-5, New Jersey imposes a retaliatory tax on foreign life and health insurance companies. In general, paragraph a of this statute provides that the retaliatory tax is calculated by comparing the taxes and other financial obligations imposed in New Jersey on a foreign insurance company doing business in New Jersey with the taxes and other financial obligations that would be imposed on the foreign insurance company in its home state. Therefore, if the taxes and other financial obligations imposed by New Jersey are lower than the taxes and other financial obligations that would be imposed by the foreign insurance company's home state, then New Jersey would collect the difference as retaliatory tax. However, paragraph b of this statute provides that the special purpose obligations or assessments imposed by the foreign insurance company's home state shall not be considered in the calculation.

In calculating the amount of the retaliatory tax, the issue was whether the statute requires that the New Jersey side of the equation include both taxes and special purpose assessments or obligations whereas the insurance company's home state's side of the equation only include taxes, or whether the purpose of the retaliatory tax requires that both sides be symmetrical.

The Court held that the statute was clear on its face and that by its express language only the insurance company's home state's side of the equation would not include special purpose assessments or obligations imposed by the home state. In support of its decision, the Court relied on the legislative history of another insurance-based retaliatory tax statute N.J.S.A. 17:32-15, that there was no agency regulation, ruling, publication, or public notice indicating the agency's position, and a Florida case with a similar statute. Furthermore, the Court reasoned that the Legislature could have rationally and reasonably determined this result because it might encourage other states to perform a similar computation as to New Jersey life and health insurance companies engaged in business in their state and thus reduce the New Jersey company's retaliatory tax liability in those states.

No appeal was filed by the State.

Litter Control Tax

Litter-Generating Products
Feesers, Inc. t/a Feesers Foods v. Director, Division of Taxation, decided June 20, 2002; Tax Court No. 004185-2001. Feesers is a Pennsylvania wholesale food distributor that sells food products in New Jersey to various institutions including nursing homes, hospitals, and universities. Most of the food products are sold in "large, institutional type," disposable packages and containers. These products include salad dressing, barbecue sauce, muffin, cake, and brownie mixes, shortening, ice cream, flour, beans, chili, salsa, cereal, and pasta. Feesers alleged that the food is prepared at the facility and consumed on premises by residents or invitees and is not intended for resale.

The Division assessed Feesers litter control tax on its New Jersey sales pursuant to the Clean Communities and Recycling Act. Although Feesers concedes that its food products meet the definition of one of the items enumerated in the statute as being subject to tax as a litter-generating product, Feesers claims that its food products are exempt from the litter control tax because its food products are prepared for on-premises consumption and the tax is not intended to target institutional food type packages and containers as they are not the types of products "that would…be found on public highways."

The Court stated that the litter tax is levied on the litter-generating products of manufacturers, wholesalers, and retailers of litter-generating products. The Court found that the Tax Court had previously ruled that litter-generating products that satisfy any one of the following three tests are subject to tax: (1) goods that are produced, distributed, or purchased in disposable containers, packages, or wrappings; or (2) goods that are commonly discarded in public places even though they are not usually sold in packages, containers, or wrappings; or (3) goods that are unsightly or unsanitary in nature, commonly thrown, dropped, discarded, placed, or deposited by a person on

either public property or on private property that is not owned by the person. (See *United Jersey Bank*).

The Court ruled that Feesers' products clearly satisfied the first test; therefore, it was irrelevant whether the products would be commonly discarded in public places such as the public highway pursuant to the second test because the tests are in the disjunctive. As to whether the litter-generating products were exempt because they were sold for on-premises consumption, the Court found that it was unnecessary to decide whether there is an exemption for retailers that sell food for on-premises consumption because the retailer's transactions with its customers could not be imputed to Feesers' sales to the retailer. Finally, the Court looked at the exemptions to the litter control tax and found that Feesers did not qualify for an exemption.

Local Property Tax

Exemption Status
Center For Molecular Medicine and Immunology v. Township of Belleville, decided May 2, 2001; Tax Court No. 000767-1998; 000580-99. The question before the New Jersey Tax Court was property tax exempt status for the years 1998 and 1999 for the Center for Molecular Medicine and Immunology, a 501(c)(3) nonprofit entity that conducts cancer research. The disputed property, renamed the Garden State Cancer Center (GSCC), was previously exempt from local property taxes as a county-owned geriatric facility under N.J.S.A. 54:4-3.3 until 1997 when it was transferred from the county to the Essex County Improvement Authority and from the ECIA to the taxpayer. The taxpayer then began a five-phase plan to rehabilitate the deteriorated building.

The first issue was property ownership, county vs. taxpayer (GSCC) and whether exemption should be permitted under N.J.S.A. 54:4-3.3 or N.J.S.A. 54:4-3.6. The two statutes are mutually exclusive. Within the deeds were two sets of reverter clauses that would transfer the property back to the county "by vesting the county with a fee simple absolute interest after a term of 25 years." The taxpayer's present interest was non-freehold and likened to a leasehold with no ownership rights. Because the deeds only granted the taxpayer an interest for a term of 25 years, the taxpayer was essentially leasing the facility and the county retains ownership. Thus, the Court found that the GSCC was owned by the county and subject to exemption under N.J.S.A. 54:4-3.3.

Another issue requires the plaintiff to prove that the use of the property was for a public purpose which was to be carried out within a reasonable period of time. Public purpose is defined by the courts as "an activity which serves to benefit the community as a whole and which at the same time is directly related to functions of government." N.J.S.A. 52:9U-2 states that the New Jersey Legislature deems cancer research a sufficient public purpose. Being that the taxpayer's primary function was cancer research and has received Federal funding for this research, the GSCC *was* clearly used for public purposes. The Court also maintained that the broadly defined police power granted to local governments enables them to regulate for the health and safety of the persons within their borders. This is a public purpose.

The remaining issue concerned that portion of the GSCC that was not currently being used. Under N.J.S.A. 54:4-3.3, the property must be wholly taxed or wholly exempt. A five-phase plan was incorporated to complete work on these sections in a reasonable amount of time and these sections were scheduled for public use so that the entire property was deemed intended for public purpose.

For reasons stated, the taxpayer qualifies for property tax exemption under N.J.S.A. 54:4-3.3 for the tax years 1998 through 1999. No analysis under N.J.S.A. 54:4-3.6 is required.

Property Tax Relief Programs

NJ SAVER Rebate: Eligible Resident
Joel Cooper v. Director, Division of Taxation, decided November 14, 2001; Tax Court No. 004436-2001. The Division denied plaintiff's application for the NJ SAVER rebate for the tax year 2000 because plaintiff's home is titled in the name of a corporation. Plaintiff is the 100% shareholder, resides in the home at issue with his six-year-old son, and neither owns nor pays rent on any other real estate. Plaintiff testified that the house was titled in corporate name so that a lien could not be placed on the house due to judgments against him for outstanding liabilities.

The Court found that although N.J.S.A. 54:4-8.58b.e allowed an NJ SAVER rebate for eligible residents where the properties were titled in the name of a partnership, guardian, trustee, committee, conservator, or other fiduciary for any individual, the statutes neither specifically included nor excluded properties titled in the corporate name.

Finding that the purpose of the NJ SAVER rebate is to provide relief to residents from local property taxes on their principal residence, the Court held that plaintiff was entitled to the rebate reasoning that the spirit and intent of the NJ SAVER program justified the rebate in this case. However, the Court made clear that its holding should not be construed to mean that every individual who holds property through a corporation is entitled to the NJ SAVER rebate.

The Division appealed this decision.

Sales and Use Tax

Scope of the Agreement
Boardwalk Regency Corp. and Adamar of New Jersey v. Director, Division of Taxation, decided November 9, 2001; Tax Court Nos. 006294-96 and 007935-96. Pursuant to a closing agreement entered into between plaintiff and the Director, Division of Taxation: "No sales or use tax will be imposed in the provision of complimentary meals or complimentary liquor effective January 1, 1986. For purposes of this amended agreement, 'complimentary meals' shall mean any transaction where the patron is not required to pay any cash consideration or any portion of a price (including any possible sales tax) of food or (non-alcoholic) beverage."

This case is on remand from the Appellate Division where it questioned whether the agreement and specifically the term "provision of complimentary meals" excludes the imposition of sales and use tax on either both plaintiffs' purchase of nonalcoholic beverages and subsequent complimentary transfer to its patrons or only the complimentary transfer to its patrons.

The Court referred to another Appellate Division decision involving this same closing agreement that concerned the taxability of alcoholic rather than nonalcoholic complimentary drinks. (See *GNOC Corp. v. Director, Division of Taxation,* 328 N.J. Super. 467 (App. Div. 2000)). There the definition of the word "provision" was not at issue to the holding because alcohol was subject only to a wholesale tax at that time and the issue concerned whether the imposition of the retail tax on alcohol superseded the agreement. However, the Court found that the Appellate Division resolved the issue of the meaning of the word "provision" by stating that the term "provision" of complimentary alcoholic beverages precludes a tax on the purchase of the alcoholic beverages that are complimentary provided to its patrons. Furthermore, the Court found that the Appellate Division specifically disagreed with the Tax Court's reasoning that to preclude both the tax on purchase and complimentary transfer would result in a transaction unfavorable to the State and therefore an improper closing agreement because the Director has broad discretion to enter into such agreements. Therefore, the Court held that plaintiff was not subject to sales or use tax on either its purchase or complimentary transfer of non-alcoholic beverages.

The Division filed an interlocutory appeal that was accepted by the Appellate Division.

Prototypes of Point-of-Purchase Displays
Urso & Brown, Inc., Predecessor to Al Gar/The Display Connection, Inc. v. Director, New Jersey Division of Taxation, decided July 8, 2002; Appellate Division No. A-3356-00T2. As reported in the Summer 2001 *State Tax News,* the Tax Court previously held that Urso & Brown's prototype purchases of point-of-purchase displays, merchandising models used by vendors to market goods to consumers, were subject to either sales tax under N.J.S.A. 54:32B-3(b)(1) or use tax per N.J.S.A. 54:32B-6(C) because the displays constituted tangible personal property upon which fabrication services were performed. The Tax Court ruled that the purchases did not qualify for the (1) N.J.S.A. 54:32B-2(e)(4)(A) exclusion as professional or personal services, (2) N.J.S.A. 54:32B-8.14 research and development exemption, or (3) N.J.S.A. 54:32B-8.14 exemption as being used directly and primarily in production.

The Appellate Division affirmed the Tax Court without discussion of the above issues in a written opinion because it ruled that Urso & Brown's arguments lacked merit.